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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Tuesday, 13 November 2018

B e f o r e:

LORD JUSTICE HOLROYDE

MRS JUSTICE FARBEY DBE

HER HONOUR JUDGE WALDEN-SMITH

(Sitting as a Judge of the CACD)

R E G I N A

v

MUCKTAR KHAN

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Mr M Magarian QC appeared on behalf of the **Appellant**

J U D G M E N T

(Approved)

1. LORD JUSTICE HOLROYDE: On 29 November 2017, after a trial in the Crown Court at Inner London before Her Honour Judge Karu and a jury, this applicant was convicted of three offences: count 2, possessing a prohibited firearm, namely a Webley .32 revolver, contrary to section 5(1)(aba) of the Firearms Act 1968; count 5, possessing an offensive weapon, namely a samurai sword, contrary to section 1 of the Prevention of Crime Act 1953; and count 6, failing to comply with a section 49 notice, contrary to section 53 of the Regulation of Investigatory Powers Act 2000.
2. On 9 February 2018 he was sentenced on count 2 to five years' detention in a young offender institution; on count 5 to 12 months' detention consecutive; and on count 6 to three months' detention concurrent. Thus the total sentence was one of six years' detention in a young offender institution. Ancillary orders for forfeiture were made.
3. The applicant applied for leave to appeal against his conviction and sentence. The applications were refused by the single judge. They are now renewed to the full court.
4. In brief summary the relevant facts were as follows. Around 1 am on 15 February 2017, police officers stopped a taxi. The two passengers were this applicant, who had celebrated his 18 birthday two weeks earlier on 2 February, and Joshua Eduardo, who was three weeks short of his 18th birthday, which would fall on 8 March. Eduardo had a samurai sword in a case inside one leg of his trousers, and was wearing a man bag in which was found a Webley .32 revolver containing three live rounds and two fired cartridge cases. The revolver was cocked and ready to fire. The applicant was wearing a bullet-proof and stab-proof vest. He had a balaclava helmet. His mobile phone, which was locked and needed a PIN to access it, was found in the footwell of the car where he had been sitting.
5. In interview the applicant made no comment. He refused to provide the police with the PIN to unlock his phone, despite being served with a notice under section 49 of the Regulation of Investigatory Powers Act 2000 requiring him to do so.
6. Both the accused were sent for trial. The indictment against them contained six counts, to which initially they both pleaded not guilty. Counts 1 and 2 charged both accused with possessing the revolver with intent to endanger life and, in the alternative, possessing a prohibited weapon. Counts 3 and 4 similarly charged them both with possessing the ammunition with intent to endanger life, or alternatively possessing ammunition. Count 5 charged them both with having an offensive weapon, namely the samurai sword. Count 6 charged the applicant alone with failing to comply with the section 49 notice.
7. Shortly before the trial began, Eduardo pleaded guilty to counts 2 and 4. The trial proceeded against both the accused on all other charges. The prosecution case, relying on evidence including messages found on Eduardo's phone, was that both accused were members of a violent gang called the Harlem Spartans. The prosecution alleged that the two accused were jointly in possession of both the revolver and the sword. There had been an incident earlier that night and it was alleged the two accused were armed

and, in the applicant's case, wearing body armour because they were about to be involved in gang-related violence.

8. Eduardo's case was that he had been required by someone whom he was not prepared to name to deliver to a third party the man bag which he believed to contain a gun (but said he did not know it was loaded) and the sword. He pleaded guilty to the two possession offences on the basis that he was a courier. He denied any intent to be involved in any violence.
9. The applicant's case was that he had merely accepted a lift with his friend Eduardo. He was a member of the Harlem Spartans, but they were a group involved in rap music, not a violent gang, and he was on his way to the studio at which they recorded. He was wearing a bullet-proof vest because he had been stabbed previously and wanted to protect himself against any further attack at a time when he was of no settled abode. He did not know that Eduardo had any weapons and did not intend to be involved in any violence.
10. The learned judge made three relevant rulings as to the admissibility of evidence. First, she permitted the prosecution to call a police officer, DC Reader, to give expert evidence about the Harlem Spartans on which the prosecution relied to show that it was a pro-violence, anti-police gang which promoted the use of weapons and violence. Secondly, she permitted the prosecution to adduce as bad character evidence against the applicant the fact that he had previously been convicted of offences of possession of an offensive weapon and possession of a bladed article. Thirdly, she permitted the prosecution to adduce evidence against Eduardo of footage found on Eduardo's phone which showed a very large hunting knife being discussed in approving terms by a group of youths.
11. The jury acquitted both accused of counts 1, 3 and 4. Eduardo accordingly fell to be sentenced only for the offences to which he had pleaded guilty, namely counts 2 and 5. The jury convicted the applicant, as we have said, of counts 2, 5 and 6.
12. It is accepted that the applicant's conviction on count 6 is safe. In relation to counts 2 and 5, however, Mr Magarian QC, who has represented the applicant throughout and for whose careful submissions we are grateful, renews his contention that the convictions are not safe. He further renews his grounds of appeal against sentence, to which we shall come shortly.
13. The grounds of appeal against conviction challenge each of the three rulings as to admissibility of evidence to which we have referred. Mr Magarian makes a number of general points. First, he says that the acquittal of both accused on counts 1, 3 and 4 means that the jury were not sure that either accused knew that the gun was loaded and not sure that either had any intention to use the revolver or the sword in a way which endangered life. Secondly, Mr Magarian points to evidence that when the taxi was stopped its location and direction of travel were inconsistent with the prosecution case as to an intent to engage in gang-related violence that night. The overall effect of the verdicts, he argues, was that the jury rejected the main thrust of the prosecution case,

and that in the absence of any immediate intent to engage in violence, the bullet-proof vest worn by the applicant was of little or no relevance.

14. In those circumstances, the focus of the grounds of appeal is on the issue of joint possession of the revolver and of the sword. In this respect, Mr Magarian submits that the prosecution evidence against the applicant was weak, because the applicant was not personally in possession of either weapon and there was no direct evidence that he was aware that Eduardo was armed. Although the police have not been able to analyse the applicant's phone, they have been able to analyse Eduardo's phone and to recover from it many WhatsApp messages passing between members of the Harlem Spartans. These included messages from the applicant, but all of his messages related to music rather than to gang violence and Mr Magarian points out that the prosecution did not rely on any of the applicant's messages as significant to the case against him. He submits that in those circumstances the case against the applicant was finely balanced. The prejudicial effect of the admission of the contentious evidence was however so powerful as to render a fair trial impossible.
15. With specific reference to the individual rulings, Mr Magarian submits first that DC Reader should not have been treated as an expert witness. Furthermore, he contends that DC Reader's evidence that the Harlem Spartans were an organised crime network was wholly unsubstantiated and later in the trial was in fact contradicted by defence evidence. He argues that DC Reader's evidence as a whole was presented in very generalised and vague terms and was for that reason difficult for the defence to challenge.
16. As to the admission of evidence of the applicant's previous convictions, these were for an offence of possession of a knife in April 2015, when the applicant was aged just 16, which for unexplained reasons did not come before a juvenile court until January 2017, and possession of an offensive weapon, namely a police baton, in September 2016, for which a youth referral order was made later that month. Mr Magarian submits that those previous convictions related to very different types of weapon: they could not assist the jury at all on the issue of whether the applicant was in joint possession of the revolver and/or sword and accordingly the effect of the evidence was purely prejudicial.
17. As to the footage on Eduardo's phone, Mr Magarian submits that although the judge directed the jury that it could only be evidence against Eduardo, it was so prejudicial that it should not have been admitted. He argues that the case against Eduardo was in any event a strong one, since he was in physical possession of both weapons and ultimately pleaded guilty to those offences, and that the footage was therefore not necessary to the prosecution's case against him.
18. Mr Magarian submits that in making her rulings permitting the prosecution to adduce each of these categories of evidence, or alternatively in refusing to exclude the evidence on grounds of fairness pursuant to section 78 of the Police and Criminal Evidence Act 1984 and/or section 101(3) of the Criminal Justice Act 2003, the judge made decisions that were not reasonably open to her. He does not criticise the terms in which the jury were directed once the decisions had been taken to admit the evidence.

19. We have reflected on Mr Magarian's submissions. We agree with him that it is appropriate to approach the case on the footing that the verdicts overall show that the jury were not sure that either of the accused knew the gun to be loaded and not sure that either of the accused intended to be involved in gang-related violence. The prosecution were nonetheless entitled to present their case on the basis that joint possession of the weapons was an inescapable inference from all the circumstances of the case, including the fact that the two accused were sitting beside one another in the back of the car, one with a samurai sword uncomfortably located within his trousers and the other wearing a bullet-proof vest. The applicant's wearing of that vest was relevant to the issues of possession, as well as to the issues of intent.
20. As to first of the rulings, DC Reader's evidence was that he had served in the police force for many years and had been extensively involved in the investigation of gang-related activity. The judge in our view was entitled to conclude that the officer had acquired sufficient expertise for it to be permissible for him to give opinion evidence as to whether the Harlem Spartans were exclusively a group of rap musicians or were rather, or in addition, a violent gang. The judge was also entitled to conclude that DC Reader had sufficient expertise to assist the jury with his opinion as to the meaning of some of the messages stored on Eduardo's phone.
21. It was of course ultimately for the jury to decide whether this evidence proved that the Harlem Spartans were a violent gang, as alleged, and whether the evidence proved that the applicant was involved in gang-related activity with the Harlem Spartans and not merely a performer of rap music. It was however open to the jury properly directed to find that the Harlem Spartans were a violent gang and that both accused were members of it. If the jury did make those findings that was evidence capable of rebutting each of the defence cases and shedding light on the knowledge and intention of both accused in relation to the weapons. If the jury were satisfied that both the accused were members of a violent gang, that common involvement could properly be viewed by the jury as making it more likely that they were in joint possession of the weapons and less likely that one was wholly ignorant of what was being carried by the other.
22. The judge had the assistance of detailed submissions as to the admissibility of this evidence. It is apparent from her ruling that she considered these submissions carefully. At page 7C of the transcript of her ruling, she identified questions which it was relevant for her to consider and at page 8B she concluded that:

"evidence which could satisfy them that the defendant was a member of a gang which was involved in the crime, the encouragement and use of violence and the carrying or use of firearms is plainly capable of assisting the jury to reach their decision."

At page 10B she rejected a defence submission that the admission of the evidence would place the defence at an unfair advantage because the decision would be impossible to challenge. She pointed out that DC Reader could be cross-examined to suggest a different interpretation of what was seen or said and that the defendants would be able to give or to call evidence about the Harlem Spartans if they chose to do so. In our judgment, no successful criticism could be made of her decision. In the

circumstances of this case, it was a decision which was not only open to her but in our view was plainly correct.

23. As for the applicant's previous convictions, the judge found that they were capable of being regarded by the jury, properly directed, as showing a propensity to carry weapons and therefore capable of supporting the prosecution case on the issues of joint possession and intent. Again, in our judgment, no successful criticism can be made of this decision.
24. We do not accept that it was a decision which had the effect of bolstering a weak or borderline prosecution case, because we do not accept that it was a weak or borderline case. The jury would of course take into account defence submissions as to the very different nature of the weapons concerned in the previous convictions and as to the absence of any conviction for an offence involving serious violence; but if they accepted that the previous convictions showed a propensity to carry weapons, that evidence was capable of providing legitimate support for the prosecution case.
25. Finally, evidence as to the footage showing the hunting knife was plainly admissible against Eduardo. It is often the case in a joint trial that evidence may be admissible against one accused but not against another. The fact that it is admissible against only one of the accused is not in itself a necessary reason for excluding it from the joint trial. The important question is whether its admission gives rise to unfair prejudice against the other accused. Here the judge directed the jury in clear and firm terms that the relevant footage could not be evidence against this applicant. We see no basis for suggesting that the jury either could not or would not follow that direction. It was a direction which in our judgment was sufficient to avoid any risk that this applicant would be unfairly prejudiced by the jury's hearing evidence which was only admissible against Eduardo. We therefore see no ground on which this ruling could be challenged.
26. Each of the three categories of evidence was therefore correctly admitted. Standing back, we have considered whether the combined effect of the rulings casts doubt on the safety of the convictions. We are satisfied that it does not. As is apparent from their verdicts, the jury were clearly alive to the issues in the case and were able to discriminate between those aspects of the prosecution case which they found to have been proved and those which they did not. There is in those circumstances no arguable ground of appeal against conviction.
27. Turning to sentence, the differing ages of the two accused and their differing previous convictions had two significant consequences for the sentencing process. First, the revolver is a prohibited firearm and therefore attracted the provisions of section 51A of the Firearms Act 1968. That section requires the court to impose a custodial term of at least the required minimum term "unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so." In the case of an offender aged 18 or over, the appropriate minimum term is one of five years' custody, but in the case of an offender aged more than 16 but under 18, the appropriate minimum term is three years' detention.

28. In relation to count 5, the applicant but not Eduardo was caught by the amended provisions of section 1 of the Prevention of Crime Act 1953 which have the effect that an offender with a previous conviction for an offence involving a bladed article must be sentenced to a custodial sentence of at least six months "unless the court is of the opinion that there are particular circumstances which (a) relate to the offence, to the previous offence or to the offender, and (b) would make it unjust to do so in all the circumstances."
29. In her sentencing remarks, the judge said that in the light of the overall verdict she would sentence on the basis that both accused were in joint possession of the weapons and both were on their way to deliver them to a third party. As she put it:

"... in temporary possession but this was against the background of gang membership."

She went on to say that carrying a weapon for someone else did not detract from the seriousness of the offences. The revolver and sword were dangerous weapons, capable of causing serious injury and even fatality when used. In relation to the revolver, the judge considered the familiar questions posed by the case of Avis. She found that the firearm was a loaded revolver in working order, though the jury's verdict suggested that neither accused knew it was loaded. It was being transported by both accused to a third party and could only have been for criminal activity. The fact that this applicant was wearing the bullet-proof vest showed a full knowledge of the weapon against the background of gang membership. The revolver had been discharged, although there was no evidence connecting either defendant to that use. Their intention was to pass the firearm to a third party for no lawful purpose. The applicant had previous convictions and had previously breached a court order. The offences had been committed shortly after he made a court appearance in January 2017.

30. The judge went on to refer rightly to the gravity of gun crime. She found that there were no exceptional circumstances for departing from the statutory minimum terms which differed by reason of the offenders' ages. As to count 5, the possession of the samurai sword, she indicated that if Eduardo had been an adult convicted after trial she would have sentenced him to 12 months on that count. But she took into account his age and gave him credit for his plea of guilty. In relation to this applicant she said:

"You are fast building up the portfolio of a dangerous young man. You continue to deny your culpability. You are aged 18 but you do appear much more mature than your years. The manner in which you gave evidence demonstrated that in the trial.

I bear in mind everything that has been said about you and the contents of the pre-sentence report. I have seen the letter which has been submitted on your behalf from the St. Giles Trust. I bear in mind in particular totality when I consider the sentence in your case."

In the result, the judge sentenced this applicant, as we have indicated. She sentenced Eduardo to three years' detention in a young offender institution on count 2 with six

months' detention consecutive on count 3.

31. The grounds of appeal against sentence are that the judge should have found exceptional circumstances for departing from the minimum term in this applicant's case because, as Mr Magarian put it in his written submissions, the applicant's liability was parasitic on that of Eduardo. It is contended that the judge's assessment of the applicant's culpability did not sufficiently reflect the important fact that he was acquitted of other charges. It is also submitted that some of the sentencing remarks suggest that the judge in determining the appropriate sentence was still influenced by the manner in which the prosecution had originally put their case but which they had been unable to prove. It is contended that there was an unfair disparity of sentencing as between the two offenders, bearing in mind how close they are in age - a total of six years' custody in the case of this applicant, but three years six months in the case of Eduardo. It is unjust, it is submitted, that the sentence on count 5 should be twice as long in this applicant's case as it is in Eduardo's case.
32. Where minimum sentencing provisions apply, it is of course necessary for the sentencer to focus upon the facts and circumstances of the specific offending. In the present case, we are unable to accept the submission that exceptional circumstances were to be found in the nature of the applicant's criminal liability. He was convicted as a joint principal, jointly involved in the possession of the weapons. There was nothing unusual in the circumstances and nothing parasitic about his criminal liability. Nor in our judgment can exceptional circumstances be found in the mere fact that one offender was aged just over 18 and the other just under 18. Regrettably, it is far from unusual for the courts to have to deal with 18-year-olds in possession of prohibited weapons. It seems to us that the clear intention of Parliament is that in this respect, those over 18 should be treated as the adults they are. The fact that the young adult offender is jointly charged with a younger offender was not, in the circumstances of this case, capable of giving rise to any exceptional circumstance.
33. So far as the sword is concerned, it is the case that the minimum sentencing provision applied only to this applicant. It is however apparent from the sentencing remarks that the judge regarded the possession of that particular weapon as justifying in any event a sentence after the trial of an adult offender of 12 months' imprisonment, consecutive to other sentences. We do not see how that approach can be faulted. A samurai sword is a terrible weapon, specifically designed to kill or to maim, and the possession of it added significantly to the overall criminality involved in the joint possession of both sword and firearm. In addition to the differing statutory regimes applicable to the two offenders, it must not be forgotten that Eduardo had the benefit of guilty pleas, albeit they were entered at a comparatively late stage. This applicant was not entitled to any credit for a guilty plea.
34. In our view the judge was faced with a difficult sentencing process. She had to reflect the will of Parliament which underlies the minimum sentencing provisions. She had to take account of totality. She also had to reflect upon the fact that only a matter of weeks separated the eighteenth birthdays of the two offenders.

35. Viewed in isolation, each of the sentences imposed upon this applicant was perfectly proper. For the firearms offence the judge rightly found that there were no exceptional circumstances and she imposed a sentence which was the minimum term required by the law in the absence of exceptional circumstances. Whilst we understand Mr Magarian's criticisms of some of the sentencing remarks, it seems to us that the sentence was that required by Parliament. It was not a sentence which the judge had increased on the basis of an incorrect view of the facts.
36. In respect of the possession of the samurai sword, where again there were no exceptional circumstances, the length of the sentence cannot be criticised. As we have said, the possession of it added significantly to the overall criminality and there was no error of principle in ordering that sentence to run consecutively to the sentence on count 2. The judge plainly and correctly had regard to totality when she ordered the applicant's sentence on count 6 to run concurrently with the other sentences.
37. Although the individual sentences therefore cannot be criticised, we have considered carefully whether there is nonetheless an unfair disparity of sentencing between the two offenders, that being the aspect of the case which lies at the heart of Mr Magarian's submissions. We bear in mind that in some circumstances, for example where the effect of schedule 21 to the Criminal Justice Act 2003 is that two offenders convicted of murder and aged just over and just under 18 attract very different starting points for the minimum term which they must serve, this court has found it proper to adjust one or both sentences so as to avoid a gross disparity. We can well understand Mr Magarian's concern that the modest difference in age between the two offenders in this case has contributed substantially to this applicant receiving a total sentence which is much longer than that of his co-accused. We understand also that from the applicant's point of view his sentence may seem unfair.
38. We conclude however that there is no ground on which this court could or should interfere with the sentences imposed below. This applicant has received a total sentence which reflects Parliament's intention in relation to the sentencing of adults who possess prohibited weapons and which imposes just and proportionate punishment for the combination of that offence and the possession of another deadly weapon, the samurai sword. The correct analysis in our view is not that this applicant's slightly older age has resulted in his receiving a disproportionately long total sentence. It is rather that Eduardo's younger age has resulted, by a narrow margin, in his receiving an advantage which Parliament has reserved for those aged under 18. It was not unfair for the judge to impose upon the applicant a sentence appropriate to his status as a young adult and which could not have been criticised if he had been sentenced alone or in company with another young adult. The apparent discrepancy is explained by the favourable treatment rightly accorded by Parliament to younger offenders.
39. We repeat our gratitude to Mr Magarian for his assistance. He was in our view justified in bringing the issues raised by the sentencing in this case to the attention of the full court and for that reason we grant leave to appeal against sentence, but for the reasons we have given the appeal fails.

40. In summary therefore, we refuse the renewed application for leave to appeal against conviction. We grant leave to appeal against sentence but we dismiss the appeal.
41. MR MAGARIAN: My Lord, I am very obliged to the court. Would it be appropriate in that circumstance to ask for a representation order to cover today?
42. LORD JUSTICE HOLROYDE: On the issue of sentence, yes. I am afraid the distinction has to be drawn -- not for conviction but certainly for sentence. Can we repeat, Mr Magarian, we found your submissions extremely helpful and you certainly could not have said more, or more effectively, than you did on the applicant's behalf.

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165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400

Email: Rcj@epiqglobal.co.uk